No. 273. 41.

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Reply Brf. of Smith & Conway for P. E.

Filed Apr. 19, 1897.

Supreme Court of the United States.

Benton Turner, Plaintiff in Error, *against* The People of the State of New York, Defendant in Error.	October Term, 1896. No. 273.

Brief for Plaintiff in Error in Reply.

I.

It is repeatedly asserted in the brief of the learned Attorney-General of New York, that the land which is the subject of this controversy is the same land which was the subject of controversy between these parties in the action reported in 117 N. Y., 227. The apparent object of this assertion is to impeach the good faith of the plaintiff in error, in purchasing the land now in controversy (see Brief of Defendant in Error, pp. 5, 8, 19, 29). These statements are not warranted by anything in record, and the learned Attorney-General is entirely in error in regard to the fact. The subject matter of the former controversy between these parties—reported in 117 N. Y., 227—was

Lot No. 219, in Township No. 10, Franklin County, and that action in no way related to the land now in dispute—the southeast quarter of Township No. 24 (see 117 N. Y., at p. 230).

The further statements, at page 19 of Defendant's Brief, that Turner "took a deed of this land December 27, "1886, * * * apparently without consideration, and "after suit had been commenced against him," is contrary to the record, which shows that this action was begun April 11, 1887 (Record, p. 8). What consideration was paid does not appear, but on the Sheriff's sale, Turner perfected his title by payment of $6,000 (Record, p. 50; twenty-seventh finding).

II.

The first point of the learned Attorney-General is devoted to an attempt to show that the defects in the tax sale were in the nature of irregularities, as distinguished from jurisdictional defects. But it is in substance conceded that *because* of these defects, whatever they may be called, the sale was invalid when it was made, and did not *of its own force* divest the former owner—Norton—of his title. It is nowhere suggested that the tax sale in question ever had vitality enough to stand alone. It is not claimed by the learned counsel for defendant that the case of *Westfall* vs. *Preston*, 49 N. Y., 349, was wrongly decided or that it has been overruled.

Neither can it be questioned that a material departure from the statute in the conduct of the proceedings leading up to the tax sale does, by the settled law of New York, render the sale *void*. The last decision of the New York Court of Appeals on this subject is *Classon* vs. *Baldwin*,

decided in March, 1897 (152 N. Y., 204, Advance Sheets of March 31). That action was ejectment, defendant claiming title under a tax sale. O'BRIEN, *J.*, says, all the judges concurring (p. 210):

> "The proceedings were purely statutory, and the "title of the owner could not be divested without a "strict compliance with all the provisions of the "statute. In such cases every requisite of the statute "having the semblance of benefit to the owner must "be substantially, if not strictly, complied with."

We say, therefore, that it must be taken as an established, if not an admitted, foundation for our argument that notwithstanding the tax sale of 1877, and the deed thereon to the state, Norton, and after his death his heirs, continued to be seized in fee and in possession.

III.

It is next contended by the learned Attorney-General that the act in question may be sustained as a *curative* law, that is, as applied to this case, a law transferring the title from the Norton heirs to the State. We do not understand that a curative law, properly speaking, requires time to become operative. If the defective proceeding be within the reach of such a law, the cure is effectual the instant the law takes effect. In this aspect the six months' feature of the act in question is not material, or, perhaps, it should be said that the act by its terms did not take effect until six months after its passage. The vital point is that the title, which was in Norton the moment before the act took effect, is by operation of law transferred to the State.

It does not in the least change the effect or operation of such a law, if it be operative at all, to say that the deed which is sought to be "cured" was void by reason of irregularities merely. In such case, just as much as in the case of a deed void for jurisdictional defects, the title is transferred from one person to another by the legislative act.

> Gilmore *vs.* Tucker (1891), 128 N. Y., 190, 200.

No case is cited by the learned Attorney-General which goes to the length necessary to sustain his contention. *Ensign* vs. *Barse*, 107 N. Y., 329, is the strongest in his favor. But in the subsequent case of *Cromwell* vs. *McLean*, 123 N. Y., 474, 490, the statute considered in the *Ensign* case is assumed to have been a statute of limitation as distinguished from a curative law.

In *William* vs. *Supervisors of Albany*, 122 U. S., 154, there was no question as to a sale of property. The statute there assailed only undertook to legalize taxes as such.

Geekie vs. *Kirby Carpenter Co.*, 106 U. S., 384. *Coulter* vs. *Stafford*, 40 Fed. Rep., 266 (should be 48 Fed. Rep., 266), and *Land and River Improvement Co.* vs. *Bardon*, 45 Fed. Rep., 711, were all cases arising under limitation laws, and do not seem to have any bearing on the validity of the law now in question, considered as a *curative* law.

The *Bardon* case was affirmed by this Court, 157 U. S., 327.

Coulter vs. *Stafford*, will be found reversed in 56 Fed. Rep., 564.

In *McCready* vs. *Sexton*, 29 Iowa, 356, no question arose under a *retroactive* law. The statute there under consideration was section 794 of the Iowa Revision of 1860.

The tax deed which was held protected by its provisions was not made until 1866. No question arises in the present case, as to the effect or validity of the New York Statute as regards sales made after its passage, and, of course, with reference to its terms.

IV.

The third point of the learned Attorney-General is devoted to an attempt to show that the law in question considered as a limitation law, did not operate to deprive citizens of property without due process of law.

He says (p. 49 of Defendant's Brief):

> "The owners and parties in interest had until the "expiration of six months after June 5, 1885, to "bring any action they desired to vacate the tax, or "any sale, conveyance, or certificate made thereunder "or to regain possession of the land."

It should be borne in mind that long before the Act of 1885 was passed the land had been sold and the deed to the People of the State of New York executed and recorded. The sale was in 1877, the deed was executed in 1881, and recorded in 1882 (Record, p. 10; Finding VI).

The remedies which the learned Attorney-General asserts were open to the land-owner during the six months allowed for the protection of his rights, seem to be as follows:

First—An action against the Comptroller to vacate the deed (Defts. Brief, Sub. Div. C, pp. 49 and 58).

Second—An action of ejectment against the Forest Commission (Defts. Brief, Sub. Div. D, pp. 50, 54, 58).

Third—A writ of mandamus to compel the Comptroller to take possession, under chapter 453 of the Laws of 1885, to the end that an action of ejectment might be brought against him (Defts. Brief, Sub. Div. E, p. 54).

Fourth—An action against somebody to remove a cloud from the title.

1. *Suit against the Comptroller to vacate the deed.*

This alleged remedy is sought to be founded upon the language of the act now in question. But, as we have shown in our principal brief, that act did not attempt to give any new remedy. It only provided that the deeds to be affected by it should be subject to cancellation "*as* "*now provided by law*, on a direct application to the "Comptroller or an action brought before a competent "Court therefor," and even this could only be done on the two grounds specified, namely, actual payment of the taxes or the levying of them by a town having no power to tax the land (Appendix, p. 79). It is conceded that the "application" to the Comptroller, which the statute mentions, cannot be made by the land-owner (Defts. Brief, p. 59), and the learned counsel for the defendant says "it has "been determined by that Court (*i. e.*, N. Y. Court of Appeals), "that the owner should commence a direct action "where the conflicting claims of all parties interested can "be determined by judicial decree" (p. 59 of Brief.) But it is plain that to such an action the "parties interested" must be made defendants, and the party interested in maintaining the tax sale is not the Comptroller, but the State. A suit to annul a deed without making the grantee in that deed a party, would be a novelty in equity practice.

It is too plain for discussion that to any action or suit to vacate the deed to the State, the State itself is an indispensable party.

Christian *vs.* Atlantic and North Carolina R. R. Co., 133 U. S., 233, 241.

2. *Ejectment against the Forest Commission:*

To this we answer—

(*a*) The argument that the Forest Commission has actual possession of the land begs the whole question, inasmuch as it assumes the land to be in fact and in law the property of the State. (See pp. 37 and 38 of our principal brief.)

(*b*) If it be assumed that the effect of the Forest Commission Law was to place that Commission in actual possession of land not in fact and in law the property of the State, then the Forest Commission Law itself is unconstitutional and void. (See principal brief, pp. 38-40.)

(*c*) Assuming the Forest Commission to have been put in actual possession of the land by force of the statute creating it, still no action could have been brought to eject them from that possession. Such possession was plainly not the possession of the individuals comprising the Commission, but simply and solely the possession of the State.

The rule invoked in the *Arlington* case could have no application to such situation. If sued as individuals and as trespassers each could truthfully answer that he had never set foot upon the land.

The Trial Court has so found as a fact in this case. (Record, p. 10; Finding IX.)

The theory upon which ejectment has been maintained against officers and agents of the Government is that they are trespassers and wrongdoers by reason of their personal

and individual possession of the property. But to say that a man can be made a wrongdoer by operation of law is a contradiction in terms. It follows, therefore, that having no possession except that which the law casts upon them as representing the State, any suit to deprive them of that possession would be, in fact, a suit against the State, even though the State were not named as a party on the record.

Cunningham *vs.* Macon & Brunswick R. R., 109 U. S., 446.
Hagood *vs.* Southern, 117 U. S., 52.
In re Ayers, 123 U. S., 443.
Christian *vs.* Atlantic & North Carolina R. R., 133 U. S., 233.
North Carolina *vs.* Temple, 134 U. S., 22.
N. Y. Guaranty Co. *vs.* Steele, 134 U. S., 230.
Pennoyer *vs.* McConnaughy, 140 U. S., 1.

(*d*) Assume the Forest Commission to have acquired actual possession of the land in question by force of the statute creating it; and also assume that an action might have been maintained against that Commission by the true owner to recover possession: then, we say, that as the Forest Commission did not come into existence until September 14, 1895, the time allowed to bring such a suit—two months and twenty-four days—was so unreasonably short as to be a denial of justice.

The learned Attorney-General says: "There was no "obstacle in the way to prevent the alleged owner of this "property from commencing suit against the Forest Com- "mission at once to test the title of the State to the lands in "question" (Defts. Brief, p. 54).

If this language be intended to apply to the time when this six months' limitation began to run against the "al-

leged owner," it is not correct. There was a very material obstacle in the way of a suit against the Forest Commission. That Commission had not then been appointed.

The facts are as follows:

The law creating the Forest Commission went into effect May 15, 1885. It provided that there should be such a commission, to be appointed by the Governor by and with the advice and consent of the Senate. The Governor on the same day appointed Basselin, Dowd and James to be commissioners, and the Senate at once confirmed them. Dowd and James, however, declined to accept the office, and no further appointment was made until September 14, 1885, when Cox and Knevals were appointed in place of Dowd and James, declined.

It is true these facts do not appear on the record, but we think the Court will take judicial notice of the appointment of public officers and the date of their Commission.

Taylor on Evidence, American edition of 1897, sec. 18; Note 1, sec. 21, p. 18.
Brown *vs.* Piper, 91 U. S., 37.
Cary *vs.* The State, 78 Ala., 78.

The counsel for defendant in error, by asserting the existence of the Forest Commission during the six months between June and December, 1885, himself asks the Court to take judicial notice of the appointment of that Commission. The statute alone did not create it. Action by the Governor and Senate, and also by the appointees, was necessary. For the purpose of enabling the Court to ascertain conveniently the facts in this regard, we submit herewith a copy, certified by the New York Secretary of State, of the appointment of the original Commission, Basselin, Dowd and James, on May 15, 1885, the certificate of the Secretary of State of New York, showing that Dowd and James omitted to file the oath of office required by law; and also certified copies

of the commissions of Cox and Knevals, dated September 14, 1885, showing their appointment in place of Dowd and James, "declined." The constitution and statutes of New York require public officers to take and file with the Secretary of State a certain oath, and failing to do so their office is *ipso facto* vacant.

Constitution of 1874, Article XII.
Public Officers' Law, secs. 3, 10 and 20.
1 R. S., 9th ed., pp. 328, 333.

(2.) The *actual possession* of the Forest Commission may well be questioned, notwithstanding the very recent decision of the Court of Appeals, which is claimed to establish it. The Judge who wrote the opinion in the case of *People ex rel. Forest Commission* vs. *Campbell*, 152 N. Y., 51, does indeed say that the Court has so *decided* in the case of People *vs.* Turner, 145 N. Y., 451 (the case now under review). But it will be difficult for *this* Court, from an examination of the record and opinion before it, to come to the same conclusion. The ground upon which the judgment of the Court of Appeals in the present case was supposed to rest, *at the time it was rendered*, was that a remedy was given the land-owner during the six months, by application to the Comptroller to cancel the illegal sale; and the distinction was clearly drawn between cases in which the State had itself become the purchaser and cases of purchase by an individual. As regards the latter case, the power of the Comptroller to cancel was denied. As to the former, it was apparently asserted (see Record, p. 66). After that decision was rendered, it seems to have occurred to the Court that the result of it was to *validate* a number of cancellations which, under its prior decisions, were void, and thus deprive the State of a large quantity of land (see *People ex rel. Forest Commission* vs. *Campbell* [1894] 82 Hun, 338). To avoid this result, it was necessary to put the decision which had been rendered in the present case

on a different ground, and at the same time avoid the difficulty of denying all remedy to the former owner of forest lands. This the New York Court has attempted to do by declaring that the Forest Commission had "*actual possession*" of the land claimed by the State. This decision, holding as it does, that a *void* tax deed may of itself work a change of possession, is contrary to what had been for many years the settled law of the State.

Johnson *vs.* Elwood (1873), 53 N. Y., 431.
Thompson *vs.* Burhans (1874), 61 N. Y., 52.

Under the circumstances, the language of this Court in *Pease* vs. *Peck*, 18 How., 595, seems to be appropriate.

GRIER, *J.* (p. 599):

> "When the decisions of the State Court are not "consistent, we do not feel bound to follow the last, "if it is contrary to our own convictions—and much "more is this the case, where, after a long course of "consistent decisions, some new light suddenly "springs up, or an excited public opinion has elicited "new doctrines subversive of former safe precedent. "Cases may exist also where a cause is got up in a "State court for the very purpose of anticipating our "decision of a question known to be pending in this "Court."

3. *Mandamus to compel the Comptroller to take possession.*

We cannot believe that the learned Attorney-General is serious in advancing this proposition. We are aware that the writ of mandamus is classed as an extraordinary remedy, but it would be an extraordinary use of even that extraordinary writ to issue it for the purpose of compelling the performance of an act which when done would be an infringement of the property rights of the relator invok-

ing the writ. Any land-owner seeking this remedy would be compelled to allege that as regards the land in question the State holds title; for it is only as to such lands that the Comptroller is authorized to take possession. The title of the State is the proposition which the land-owners deny.

4. *An action to remove a cloud from title.*

This is only another name for the action first suggested —to vacate the tax sale and deed. How it could have been maintained *against* the State, or how it could have been maintained *in the absence* of the State, the Court is not informed.

V.

The learned Attorney-General at the close of his brief seeks to charge some inconsistency upon the counsel for the present plaintiff by referring to the case of *Saranac Land and Timber Co.* vs. *Roberts*, 68 Fed. Rep., 521. That case was an action of ejectment against the Comptroller, in which counsel for the present plaintiff claimed the right to try the title of the State. And it is said that the reasoning of counsel is "peculiar" in asserting the right to try the title of the State in the action against the Comptroller, and denying it in an action against the Forest Commission.

We do not think there is any inconsistency to answer or explain. The Act of 1893, under which the action against *Roberts* is brought, gives express permission to sue him as representing the State. There is no such statute as to the Forest Commission.

Dated April 5, 1897.

FRANK E. SMITH,
THOMAS F. CONWAY,
Counsel for Plaintiff in Error.

IN SENATE—EXECUTIVE SESSION, May 15th, 1885.

The Governor having made the following nominations the same were duly confirmed and ordered to be transmitted.

To be Forest Commissioners, pursuant to the provisions of chapter two hundred and eighty-three of the Laws of 1885.

D. WILLIS JAMES,
WILLIAM DOWD,
THEODORE B. BASSELIN.

* * * * * *

By Order of the Senate,

D. MCCARTHY,
President.

JOHN W. VROOMAN,
Clerk.

STATE OF NEW YORK, } ss.:
Office of the Secretary of State, }

I have compared the preceding Extract from Appointments by the Governor and Senate, 1883 to 1885, with the original on file in this office, and do hereby certify that the same is a correct transcript therefrom and the whole thereof, relating to Confirmation of Forest Commissioners May 15th, 1885.

Given under my hand and Seal of office of the Secretary of State, at the City of Albany this 24th day of March, in the year one thousand eight hundred and ninety-seven.

[L. S.] ANDREW DAVIDSON,
Deputy Secretary of State.

STATE OF NEW YORK,
Office of the Secretary of State, } ss.:

I Hereby Certify, That I have made diligent examination in this office for the Oaths of Office of D. Willis James and William Dowd, appointed Forest Commissioners, May 15th, 1885, and that upon such examination, I find no Oaths of said D. Willis James and William Dowd as Forest Commissioners on file in this office.

Witness, my hand and the Seal of the Secretary of State, at the City of Albany, this 31st day of March one thousand eight hundred and ninety-seven.

[L. S.] ANDREW DAVIDSON,
Deputy Secretary of State.

THE PEOPLE OF THE STATE OF NEW YORK, by the Grace of God free and independent: To all to whom these Presents shall come, Greeting:

KNOW YE, That we have nominated, constituted and appointed, and by these Presents do nominate, constitute and appoint

SHERMAN W. KNEVALS,

Forest Commissioner

in the place of William Dowd, declined.

Hereby giving and granting unto him all and singular, the powers and authorities to the said office by law belonging or appertaining: To Have and to Hold the said office together with the fees, profits and advantages

to the same belonging, for and during the time limited by the Constitution and Laws of our said State.

In Testimony Whereof, We have caused these our Letters to be made Patent, and the great seal of our said State to be hereunto affixed. Witness, David B. Hill, Governor of our said State, at our City of Albany, the fourteenth day of September in the year of our Lord one thousand eight hundred and eighty-five.

[L. S.] DAVID B. HILL.

Attested by

JOSEPH B. CARR,
Secretary of State.

STATE OF NEW YORK,
Office of the Secretary of State, } ss.:

I have compared the preceding copy of Commission by the Governor with the record thereof in this office, in Book Number 7, of Commissions by the Governor, at page 373 and I do hereby certify the same to be a correct transcript therefrom, and of the whole thereof.

Witness my hand and the seal of office of the Secretary of State, at the City of Albany, the 24th day of March one thousand eight hundred and ninety-seven.

[L. S.] ANDREW DAVIDSON,
Deputy Secretary of State.

THE PEOPLE OF THE STATE OF NEW YORK, by the Grace of God free and independent: To all to whom these Presents shall come, Greeting:

KNOW YE, That we have nominated, constituted and appointed and by these Presents do nominate, constitute and appoint

TOWNSEND COX,

Forest Commissioner

in place of D. Willis James, declined.

Hereby giving and granting unto him all and singular, the powers and authorities to the said office by law belonging or appertaining: To Have and to Hold the said office together with the fees, profits and advantages to the same belonging, for and during the time limited by the Constitution and Laws of our said State.

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ANDREW DAVIDSON,
Deputy Secretary of State.